

Legislation May Affect US Reviews of Foreign Investments

Calls to increase scrutiny of foreign investment in the United States have gained strength in the US Congress, and now there are several proposals for changes to the Committee on Foreign Investment in the United States (“CFIUS”), the multi-agency committee that reviews foreign acquisitions of US businesses that might threaten national security. These proposals would significantly reshape the review process for foreign investment in the United States and for some transactions outside of the United States, with important consequences for foreign investors and US businesses alike.

CFIUS Operations under Current Law

CFIUS is chaired by the Secretary of the Treasury and includes the heads of the Departments of Commerce, Defense, Energy, Homeland Security, Justice, and State; the Office of the US Trade Representative; and the Office of Science and Technology Policy. The Office of Management and Budget, the Council of Economic Advisors, the National Security Council, the National Economic Council, and the Homeland Security Council also participate in CFIUS’s activities as needed. Under current law, CFIUS reviews “covered transactions” involving the potential control of US businesses by foreign persons in order to determine whether such transactions pose a national security risk to the United States. Though the submission of transactions for review by CFIUS is technically voluntary, CFIUS has the ability to initiate its own review of transactions that have already

been completed and, if warranted, to require that they be altered or even unwound.

As foreign investment in the United States increases, CFIUS has become busier than ever. In 2016, for example, CFIUS reviewed 172 notices of covered transactions—nearly double the number (97) it reviewed in 2013.¹ Despite the increase in activity, many lawmakers have raised concerns about the limitations of CFIUS’s jurisdiction. Three pieces of proposed legislation would address these perceived shortcomings.

Foreign Investment Risk Review Modernization Act

On November 8, 2017, Sen. John Cornyn (R-TX) and nine co-sponsors (four Democrats and five Republicans) introduced the Foreign Investment Risk Review Modernization Act (“FIRRMA”). A companion bill was introduced in the House by Rep. Robert Pittenger (R-NC-09) and 13 co-sponsors (three Democrats and ten Republicans). Though it does not mention specific countries, Sen. Cornyn has stated that the bill is intended to update CFIUS practice so as to focus on national security threats posed by “the investment-driven transfer of leading-edge technology that China is vigorously pursuing today”² and other concerted efforts by countries that threaten US national security. The bill would broaden CFIUS’s authority and authorize it to examine additional types of transactions. It would not expand CFIUS’s jurisdiction to include “greenfield” investments.

FIRRMA would expand the scope of transactions that CFIUS could review. Under the bill, the following would be considered “covered transactions”:

- Any merger, acquisition, or takeover that is proposed or pending after August 23, 1988, by or with any foreign person that could result in foreign control of any US business.
- The purchase or lease by a foreign person of private or public real estate that:
 - is located in the United States and is in close proximity to a US military installation or to another facility or property of the US government that is sensitive for reasons relating to national security; and
 - meets additional criteria that CFIUS will prescribe through regulation.
- Any other investment (other than passive investment) by a foreign person in any US critical technology company or US critical infrastructure company, subject to regulations to be prescribed.
- Any change in the rights that a foreign person has with respect to a US business in which the foreign person has an investment if that change could result in—
 - foreign control of the US business; or
 - the type of investment in critical technology or critical infrastructure companies described above.
- The contribution by a US critical technology company (other than through an ordinary customer relationship) of both intellectual property and associated support to a foreign person through any type of arrangement, such as a joint venture, subject to regulations to be prescribed.

Thus, this legislation would dramatically expand the scope of CFIUS jurisdiction in two ways: first, where a foreign person does not actually gain “control” of a US business but has influence beyond a passive investment (in the case of critical technology and critical infrastructure companies); and second, where there is no “US

business” but a US critical technology company contributes IP and “associated support” to a foreign person, other than through an ordinary customer relationship. “Associated support” is slated by the bill to be defined by CFIUS through regulation, and “ordinary customer relationship” is not defined.

The term “critical technologies” would also be further defined by CFIUS and would include:

- Technology, components, or technology items that are essential or could be essential to national security, identified pursuant to regulations prescribed by CFIUS.
- Defense articles or defense services included on the US Munitions List set forth in the International Traffic in Arms Regulations.
- Items included on the Commerce Control List of the Export Administration Regulations and controlled—
 - pursuant to multilateral regimes, including for reasons relating to national security, chemical and biological weapons proliferation, nuclear nonproliferation, or missile technology; or
 - for reasons relating to regional stability or surreptitious listening.
- Specially designed and prepared nuclear equipment, parts and components, materials, software, and technology.
- Nuclear facilities, equipment, and material.
- Select agents and toxins.
- Other emerging technologies that could be essential for maintaining or increasing the technological advantage of the United States over countries of special concern with respect to national defense, intelligence, or other areas of national security or for gaining such an advantage over such countries in areas where such an advantage may not currently exist.

The bill defines a “country of special concern” as “a country that poses a significant threat to the national security interests of the U.S.”

The term “critical infrastructure” would be further defined by CFIUS but would also include “systems and assets, whether physical or virtual, so vital to the U.S. that the incapacity or destruction of such systems or assets would have a debilitating impact on national security.”

While the submission of a notification to CFIUS would remain technically voluntary under the bill, a new concept is also introduced: that of a “voluntary declaration” or “light” filing. In most instances, parties to covered transactions could submit these declarations, limited to five pages, with the aim of receiving from CFIUS a notification that no further action is required. In certain instances, filing a declaration or a full notice would be mandatory. These include instances of transactions involving the acquisition of a 25 percent or greater voting interest in a US business by a foreign person that itself is owned 25 percent or more, directly or indirectly, by a foreign government. Through regulations, CFIUS would also clarify additional instances in which a declaration would be required, based on certain technologies or economic sectors; the difficulty of remedying a transaction’s harm to the national security; or the difficulty of obtaining information about a transaction. In response to a declaration, CFIUS could request the filing of a written notice, unilaterally initiate a review of the transaction, or notify the parties that no further action would be taken with respect to the transaction.

The bill would extend CFIUS’s initial review period for covered transactions from 30 to 45 days. It would also allow for the investigation period (which is currently capped at 45 days) to be extended by 30 days at the request of the head of a lead CFIUS agency (which, depending on the transaction, could be Treasury or another CFIUS agency).

FIRRMA would also add a number of new factors to the list that CFIUS could consider in its review of a transaction and expand current factors. For example, under the bill, CFIUS could consider, among other factors:

- Whether the transaction is likely to reduce US technological and industrial advantage relative to a country of special concern.
- The potential national security effects on the cumulative foreign persons’ market share of any one type of infrastructure, energy asset, or technology.
- The extent to which personally identifiable information or other sensitive data of US citizens would be exposed to foreign persons or governments that may exploit it.
- The effect of a transaction on new cybersecurity vulnerabilities or the exacerbation of existing ones.
- The involvement of countries of special concern.
- The likelihood of a foreign government gaining a capability to engage in new malicious cyber activities against the United States.

Finally, the bill would institute the practice of filing fees for notifications. The precise amounts would be fixed by regulations but would be limited to the lesser of 1 percent of the total value of the transaction or \$300,000 (adjusted annually for inflation).

United States Foreign Investment Review Act

In October 2017, Sens. Charles Grassley (R-IA) and Sherrod Brown (D-OH) introduced the United States Foreign Investment Review Act of 2017. The bill aims to ensure that foreign investments are “in the long-term economic interests of the U.S.”³ and to prevent foreign investors who are “determined to put American companies out of business.”⁴ The bill would require state-owned enterprises involved in transactions of \$50 million or more and non-state-owned parties to transactions worth \$1 billion or more to notify the Department of Commerce of the transactions. The bill would also allow the chairperson and ranking member of the Senate Finance Committee or the House Ways and Means Committee to request a review of a transaction, regardless of its value.

When conducting reviews under the bill, the secretary of commerce is to determine the economic effects of the transaction on the United States, taking into account US long-term strategic economic interests, any history of distortive trade practices in the countries in which foreign parties to the transaction are domiciled, control and ownership of the foreign parties involved, any impact of the transaction on US industries, and other factors the secretary considers appropriate. The secretary of commerce would have 15 days to approve a transaction, prohibit it, or determine that additional review is necessary. In the case of additional review, the secretary of commerce would have an additional 30 days (for a total of 45 days after receiving a written notification of a transaction) to approve the transaction, prohibit it, or require that the transaction be modified. If necessary, this 45-day deadline could be extended by an additional 15 days but all reviews would be completed within 60 days of the receipt by CFIUS of a written notification. Pursuant to the bill, the Department of Commerce would also make transaction notifications available to the public and seek public comment for transactions it determines require extended review.

The Department of Commerce's reviews would be independent of any reviews of a transaction by CFIUS, and CFIUS would maintain responsibility for conducting reviews to assess possible national security threats.

Food Security Is National Security Act of 2017

In March 2017, Sen. Grassley and Sen. Debbie Stabenow (D-MI) introduced the Food Security is National Security Act of 2017. The bill would add the secretary of agriculture and the secretary of health and human services to the roster of CFIUS members. It would also require that, in its reviews, CFIUS consider the potential effects of a transaction on US food and agriculture systems, including the access to, safety of, or

availability of food. Since its introduction, the bill has gained two additional co-sponsors, but it has not advanced through the legislative process in the Senate.

Recommendations for Investors and US Businesses Seeking Foreign Investment

Reforms of US foreign investment laws are starting to coalesce, and the bills detailed above provide an insight into lawmakers' views. While it is not clear at this time whether the proposed CFIUS reforms will be combined into a single bill, it is clear that significant support for reform exists. Foreign investors and US businesses should pay close attention to the legislative process as the foregoing bills, or others, are considered, debated, and refined.

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Endnotes

- ¹ Committee on Foreign Investment in the United States, *Covered Transactions, Withdrawals, and Presidential Decisions, 2014-2016*.
- ² <https://www.cfr.org/event/foreign-investments-and-national-security-conversation-senator-john-cornyn>.
- ³ <https://www.grassley.senate.gov/news/news-releases/grassley-brown-introduce-bipartisan-bill-make-sure-foreign-investments-don%E2%80%99t-hurt>.

⁴ <https://www.brown.senate.gov/newsroom/press/release/brown-grassley-introduce-bipartisan-bill-to-make-sure-foreign-investments-dont-hurt-us-economy-jobs>.

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